In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-127

ASSOCIATED SHOWER DOOR CO., INC., AND CENTURY SHOWER DOOR COMPANY, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 512 F.2d 230. The decision and order of the National Labor Relations Board (Pet. App. B1-B34) are reported at 205 NLRB 677.

JURISDICTION

The judgment of the court of appeals enforcing the Board's order (Pet. App. C1-C8) was entered on May 2, 1975. The petition for a writ of certiorari was filed on July 23, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly deferred to the compliance stage of its proceeding the resolution of any possible conflict between the terms of the collective bargaining agreement and then-applicable wage controls.

2. Whether the Board properly retained jurisdiction over petitioners after they had purportedly withdrawn from an employers' association.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), and the Economic Stabilization Act of 1970 (84 Stat. 799, as amended, 84 Stat. 1468, 85 Stat. 13, 85 Stat. 38) are set forth at Pet. App. E1 and E3-E5.

The following relevant regulations are set forth in the Appendix to this brief:

1. Executive Order 11588, 36 Fed. Reg. 6339, Sec-, tions 2, 3, 4 and 11(a) (App., *infra,* pp. 8-9);

2. Executive Order 11627, 36 Fed. Reg. 20139, Introduction and Section 14 (App., *infra,* pp. 10-12);

3. Pay Board Regulations—Part 201—Stabilization of Wages and Salaries, 36 Fed. Reg. 21790, Sections 201.10, 201.14 and 201.15 and the Appendix (App., *infra,* pp. 12-15).

STATEMENT

1. On August 3, 1971, the Board certified the Glaziers & Glassworkers Union Local 636, International Brotherhood of Painters and Allied Trades, AFL-CIO (the "Union") as the representative of production, maintenance and installation employees in a multi-employer unit made up of ten employers whose bargaining negotiations were conducted by the Association of Shower Door Industries, Inc. (the "Association") (Pet. App. B11, B13). The bar-

gaining negotiations between the Union and the Association reached an impasse on September 15, 1971, and the Union struck all the members of the Association (Pet. App. B14-B15). Within the next eight days three members of the Association signed identical contracts with the Union (Pet. App. B15-B16).[1]

Early in October, petitioners and one other Association member attempted to withdraw the Association's authority to represent them, but the Union refused to consent to the withdrawals (Pet. App. B16-B17). Negotiations resumed in mid-October, with representatives of petitioners participating. On November 11 or 13, the Association and the Union agreed upon a contract (Pet. App. B20-B21). Petitioners subsequently refused to accept that contract (Pet. App. B21-B22).

The Board concluded that petitioners violated Section 8(a)(5) and (1) of the Act by refusing to be bound by the terms of the collective bargaining agreement negotiated by the Association and the Union (Pet. App. B2-B3, n.2). The Board rejected petitioners' argument that they had effectively withdrawn from the Association and found that, in any event, petitioners had retracted their purported withdrawals by participating in the resumed negotiations (Pet. App. B3). The Board ordered petitioners, *inter alia*, to comply with the contract and make their employees whole for any losses suffered by reason of their unlawful refusal to comply therewith (Pet. App. B32).

The court of appeals agreed with the Board that the withdrawals had been retracted, and on that basis enforced the Board's order (Pet. App. A3).

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[1]One company dropped out of the unit by mutual consent, having disposed of its shower door business (Pet. App. B15, B23, n. 8).

2. Petitioners do not challenge the conclusion that they retracted their withdrawal from the Association and thus are bound by the contract negotiated by the Assoiation. Rather, they contend that the Economic Stabilization Act of 1970 and certain Executive Orders and Regulations promulgated thereunder precluded the Board from ordering them to give effect to the contract.

Briefly, the facts relating to that aspect of the case are as follows:

Phase I of the federal wage and price control program was in effect throughout the final period of negotiations. On November 8, 1971, the Pay Board announced that contracts existing prior to November 14, 1971, would not be subject to review absent a challenge by a party-ininterest or by five members of the Pay Board; Pay Board regulations effective November 14, 1971, confirmed that procedure (36 Fed. Reg. 21790-21792, Sections 201.10 and 201.14, and the Appendix) (App., *infra,* pp. 12-15). While the companies could have sought review of the cost provisions of the contract under these regulations, none did.

On October 15, 1971, Executive Order 11627 incorporated the Construction Industry Stabilization Committee ("C.I.S.C.") into the Pay Board mechanism (36 Fed. Reg. 20139, Section 14) (App., *infra,* pp. 11-12). The November 14, 1971, Pay Board regulations (36 Fed. Reg. 21792, Section 201.15) (App., *infra,* p. 13) continued the C.I.S.C. jurisdiction, as established by Executive Order 11588 issued March 29, 1971 (36 Fed. Reg. 6339). Under the C.I.S.C. regulations, all wage agreements in "construction" as defined in Section 11(a) of Executive Order 11588 had to be submitted to an appropriate "craft dispute board," which would determine if increases were excessive and thus subject to reversal by C.I. S.C. (36 Fed. Reg. 6339-6340, Sections 2, 3 and 4) (App., *infra,* pp. 8-9). The record shows that the Union sought clearance from the appropriate craft board

but was informed by that board that shower door employees were not covered by C.I.S.C. (Tr. 105-106).[2]

At the unfair labor practice hearing, petitioners argued that the contract was not final because it was subject to prior approval by the Pay Board (Tr. 260). No allegation was made at the hearing that there had been substantive violations of applicable wage freeze regulations. It was not until their exceptions to the administrative law judge's decision were filed with the Board that petitioners alleged the invalidity of the contract on such grounds. Since that issue was not litigated at the hearing, the Board left "to the compliance stage of this proceeding the resolution of any conflict which may exist beween the contract and the Wage and Price Freeze Regulations then in effect" (Pet. App. B3, n. 3). The court of appeals found that the Board had acted properly (Pet. App. A5, n. 4).

ARGUMENT

1. The basic issue presented by this case is whether petitioners were bound by the bargaining contract negotiated on their behalf by the Association. The fact that the compensation items of all bargaining contracts negotiated during that period in 1971 were subject to possible modification under the Economic Stabilization Act of 1970 (Pet. App. E1-E5) does not affect the authority of the Association to bind petitioners. Similarly, the fact that some provisions of the contract might have required prior approval under C.I.S.C. regulations (*supra*, p. 4) before they could be implemented does not derogate from the authority of the Association to bind petitioners. Should any part of the contract later be declared invalid under applicable law, petitioners, like any other Associ-

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[2] "Tr." references are to the transcript of the unfair labor practice hearing, which has been lodged with the Court.

ation members, would of course not be bound thereby. For these reasons, and because of the belated way in which petitioners raised the issue (*supra*, p. 5), the Board properly deferred to the compliance stage of its proceeding any issue concerning the substantive invalidity of any contractual term under wage and price control regulations.

2. Petitioners further contend (Pet. 15-16) that, since there was no showing that they met the discretionary jurisdictional standards adopted by the Board except by virtue of their membership in the Association, the Board lost jurisdiction when they left the Association. However, there is no evidence that these or the other defections from the Association destroyed its viability; rather, the court of appeals concluded that, while the actions of the Union entitled petitioners to withdraw from the Association, it continued to represent the remaining members (Pet. App. A3). In any event, the basis of Board's assumption of jurisdiction over members of a multi-employer bargaining unit, where individual members alone may not meet the Board jurisdictional standards, is their joint bargaining, not the nature of their formal association. "[I]t is unimportant whether or not the Association existed as a formal entity, so long as it is clear that [petitioners] acted jointly with the other employers in the Association in the negotiation of collective agreements, as the impact upon interstate commerce would be the same in either case." *National Labor Relations Board* v. *Gottfried Baking Co.*, 210 F.2d 772, 778 (C.A. 2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1975.

APPENDIX
Executive Order 11588: Stabilization of Wages and Prices in the Construction Industry

* * * * *

Section 2. Associations of contractors and national and international unions shall jointly establish craft dispute boards (hereinafter referred to as "boards") to determine whether wages and salaries are acceptable in accordance with the criteria established in section 6. Each board shall be composed of appropriate labor and management representatives.

Section 3. (a) It shall be the responsibility of each board, in relation to the craft or branch over which it has jurisdiction, to provide advice and assistance in an effort to resolve any unresolved collective bargaining disputes involving wages and salaries and to promptly examine every collective bargaining agreement negotiated on or after the date of this order and to determine, in accordance with the criteria established in section 6, whether wage and salary increases in the agreement are acceptable and may thus be approved. The board shall make determinations within a reasonable time and shall notify the parties and the Committee of action taken. When it is determined by the board that a wage or salary increase is not acceptable, the board shall also notify the Secretary of Labor.

(b) Each board shall also have the authority to examine collective bargaining agreements negotiated prior to the date of this order which contain wage or salary increases scheduled to take effect on or after such date to determine whether any increase is unreasonably inconsistent with the criteria established in section 6.

Section 4. (a) Upon receipt of notification by a board that it has found a wage or salary increase acceptable, the Committee shall have fifteen days in which to determine whether it will assume jurisdiction over the matter. If the Committee does not determine within that time, and so

notify the parties and the board, that it will assume jurisdiction, the board's determination will be deemed final and the increase may take effect. If the Committee determines that it will assume jurisdiction it shall be a violation of this order to implement the increase unless and until the Committee affirms the board's initial determination. The Committee shall notify the parties, the board and the Secretary of Labor of its final action.

(b) The Committee is also authorized, upon its own motion, if a board has not yet reported or an appropriate board has not been established, to review any proposed wage or salary increase to determine its acceptability.

(c) Unless and until an increase in wage or salary has been approved in accordance with the provisions of sections 3(a) and 4 of this order, it shall be a violation of this order to put such wage or salary increase into effect.

* * * * *

Section 11. (a) The term "construction" shall mean, for the purpose of this order (1) all work relating to the erecting, constructing, altering, remodeling, painting, or decorating of installations such as buildings, bridges, highways and the like, when performed on a contract basis, but shall not include maintenance work performed by workers employed on a permanent basis in a particular plant or facility for the purpose of keeping such plant or facility in efficient operating condition; (2) the transporting of materials and supplies to or from a particular building or project by the workers of the contractor or subcontractor performing the construction or the manufacturing of materials, supplies, or equipment on the site of a project by such workers; and (3) all other work classified as construction in section 5.2(g) of Part 5, Title 29 of the Code of Federal Regulations.

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Executive Order 11627: Stabilization of the Economy

On August 15, 1971, I issued Executive Order No. 11615 providing for the stabilization of prices, rents, wages, and salaries, for a period of 90 days from the date of that Order. That Order also established the Cost of Living Council and charged it with the primary responsibility for administering the stabilization program, and for recommending to me additional policies and mechanisms to permit an orderly transition from the 90-day general price, rents, wages, and salaries freeze imposed by Executive Order No. 11615 to a more flexible and selective system of economic restraints.

I have received recommendations from the Cost of Living Council, and have determined that the intent of the Economic Stabilization Act of 1970 (P.L. 91-379; 84 Stat. 799), as amended, can more effectively be carried out and the goals I specified in my speech to the Nation on October 7, 1971, can more effectively be achieved, on and after the date of this Order, by substituting this Order for Executive Order No. 11615, as amended. Notwithstanding this substitution, the findings which I made in the preamble of Executive Order No. 11615 of August 15, 1971, are, after careful reconsideration, reaffirmed.

Under this Order, the Cost of Living Council will be continued and will be given broad authority to stabilize prices, rents, wages, and salaries for so long as the Economic Stabilization Act of 1970, as amended, is in effect or until such other time as the President may hereafter prescribe. This, in effect, will result in the establishment of a new economic stabilization program. That program will be carried out through a Pay Board and a Price Commission each of which is newly established by this Order. The Pay Board will be a tripartite organization composed of five representatives of organized labor, five representatives of business, and five representatives of the general public. The Price Com-

mission will be composed of seven members, all from the general public. The President will appoint all members of both the Board and the Commission and will designate the Chairman of each, who will be a full-time official of the United States.

The Cost of Living Council will establish broad stabilization goals for the Nation, and the Pay Board and Price Commission, acting through their respective Chairmen, will prescribe specific standards, criteria, and regulations, and make rulings and decisions aimed at carrying out these goals.

In addition, this Order establishes three new committees to assist the Council, the Pay Board, and the Price Commission in the performance of their functions. They are the Committee on Interest and Dividends, an inter-agency body made up of the heads of various Federal departments and agencies having financial regulatory functions; the Committee on the Health Services Industry; and the Committee on State and Local Government Cooperation.

Finally, this Order modifies Executive Order No. 11588 so as to bring the Construction Industry Stablization Committee established by that Order into the framework of the new economic stabilization program established by this Order.

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, particularly the Economic Stabilization Act of 1970, as amended, it is hereby ordered as follows:

* * * * *

Section 14. (a) The Construction Industry Stabilization Committee established by Executive Order No. 11588 of March 29, 1971, and the craft dispute boards authorized by section 2 of that Order, are hereby continued.

(b) The Chairman of the Pay Board, established by section 7 of this Order, shall henceforth perform all functions vested in the Secretary of Labor by Executive Order No. 11588, with respect to (1) the certification of determinations that a proposed wage or salary increase is not acceptable, (2) the approval of rules and regulations issued by the Construction Industry Stabilization Committee, and (3) the issuance of rules and regulations.

(c) Subsection (d) of section 5 and section 6 of Executive Order No. 11588, are hereby revoked.

(d) Subsections (a) and (c) of this section are effective immediately. Subsection (b) of this section shall be effective on the day the Chairman of the Pay Board gives notice that the Pay Board is operational.

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PAY BOARD REGULATIONS
PART 201—STABILIZATION OF WAGES AND SALARIES

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§201.10 General wage and salary standard.

On and after November 14, 1971, the general wage and salary standard shall be applicable to new labor agreements and, where no labor agreement is in effect, to existing pay practices. On and after such date, permissible annual aggregate increases will be those normally considered supportable by productivity improvement and cost of living trends. Initially, the general wage and salary standard is established as 5.5 percent. The appropriateness of this figure will be reviewed periodically by the Pay Board, taking into account such factors as the long-term productivity trend of 3 percent, cost of living trends, and the objective of reducing inflation.

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§201.14 Wage and salary increases effective after November 13, 1971.

Existing contracts and pay practices previously set forth will be allowed to operate according to their terms except that specific contracts or pay practices are subject to review, when challenged by a party at interest or by five or more members of the Pay Board, to determine whether any increase is unreasonably inconsistent with the criteria established by this Board. In reviewing existing contracts and pay practices, the Pay Board will consider ongoing collective bargaining and pay practices and the equitable position of the employees involved, including the impact of recent changes in the cost of living upon the employee's compensation.

§201.15 Unaffected wages and salaries.

Until further action of the Pay Board, those classes of wages and salaries which were held by the Cost of Living Council not to be subject to control by the freeze shall not be affected by this part. However, this section shall not exempt any contracts subject to Executive Order No. 11588 of March 29, 1971, relating to the stabilization of wages and prices in the construction industry, as amended by Executive Order No. 11627 of October 16, 1971, further providing for the stabilization of the economy, from the general wage and salary standards in this part.

APPENDIX
POLICIES GOVERNING PAY ADJUSTMENTS ADOPTED BY THE PAYBOARD NOVEMBER 8, 1971

1. Millions of workers in the Nation are looking to the Pay Board for guidance with respect to permissible changes in wages, salaries, various benefits and all other forms of employee total compensation. It is imperative to have a simple standard with as broad a coverage as possible at as early a date as possible. There is probably a need for exceptions and for individual consideration of special

situations as soon as practical, and guidance to the millions whose pay relations are relatively simple is an early essential.

2. This general pay standard is intended, in conjunction with other needed measures, to meet the objectives which led to the establishment of this Board.

3. The general pay standard should be applicable to:

(1) Changes that need approval before becoming effective;

(2) Changes that must be reported when they become effective; and

(3) All other changes requiring compliance but not requiring specific approval or reporting.

4. (a) Effective November 14, 1971, the general pay standard shall be applicable to new labor agreements and, where no labor agreement is in effect, to existing pay practices. The general pay standard would provide:

On and after November 14, 1971, permissible annual aggregate increases would be those normally considered supportable by productivity improvement and cost of living trends. Initially, the general pay standard is established as 5.5 percent. The appropriateness of this figure will be reviewed periodically by the Board, taking into account such factors as the long-term productivity trend of 3 percent, cost of living trends, and the objective of reducing inflation.

In reviewing new contracts and pay practices, the Pay Board shall consider ongoing collective bargaining and pay practices and the equitable position of the employees involved, including the impact of recent changes in the cost of living upon the employees' compensation.

(b) Existing contracts and pay practices previously set forth will be allowed to operate according to their terms except that specific contracts or pay practices are subject to review, when challenged by a party at interest or by five or more members of the Board, to determine whether any increase is unreasonably inconsistent with the criteria established by this Board. In reviewing existing contracts and pay practices, the Pay Board shall consider ongoing collective bargaining and pay practices and the equitable position of the employees involved, including the impact of recent changes in the cost of living upon the employees' compensation.

(c) Scheduled increases in payment for services rendered during the "freeze" of August 16 through November 13, 1971, may be made only if approved by the Board in specific cases. The Board may approve such payments in cases which are shown to meet any of the following criteria:

(i) Prices were raised in anticipation of wage increases scheduled to occur during the "freeze."

(ii) A wage agreement made after August 15, 1971 succeeded an agreement that had expired prior to August 16, 1971, and retroactivity was an established practice or had been agreed to by the parties.

(iii) Such other criteria as the Board may hereafter establish to remedy severe inequities.

5. Following approval of special procedures by the Pay Board with respect to hearing "prior approval" cases and other special situations, application may be made for an exception to the general pay standard and for a hearing on such matters as inequities and sub-standard conditions.

6. No retroactive downward adjustment of rates now being paid will be required by operation of the general pay standard unless the rates were raised in violation of the freeze or of the general pay standard.

7. Provisions may be considered for vacation plans, in-plant adjustments of wages and salaries, in-grade and length of service increases, payments under compensation plans, transfers and the like.